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In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES E. ROEMER, II,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOL. I

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QUESTION PRESENTED

As part of an undercover "sting operation" federal agents posed as corrupt businessmen eager to pay bribes to state public officials and ultimately obtained the agreement of such a state official to accept a bribe in violation of state law. Thereafter the masquerading agents acting on their own initiative and at their own direction drafted, addressed and mailed a letter to the official. In the subsequent prosecution of that official, the government relied upon that mailing to transform the state bribery into federal mail fraud and in turn relied upon that federal mail fraud as the second predicate crime, beyond the state bribery itself, necessary to charge a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act (RICO). By the government initiated mailing, a simple state bribery was thus multiplied into two crimes, a federal mail fraud and a state bribery, and then alchemized into a RICO offense with drastically enhanced penalties.

Should the government, either as a matter of statutory construction, federal jurisdiction, due process or otherwise, be permitted to rest a federal criminal prosecution upon a use of the mails entirely confected and effected by its own agents in the course of a masquerade designed by those agents.

PARTIES

The parties to the proceeding in the court of appeals were the respondent United States, the petitioner Charles E. Roemer, II, and Carlos Marcello, a co-defendant with Roemer.[1]

[1] Marcello's application for rehearing was denied by the court of appeals two weeks later than Roemer's. Counsel for Roemer understands that Marcello intends to petition this Court for a writ of certiorari and that in doing so, Marcello will raise an issue concerning the RICO "enterprize" element of the indictment, the proof, and the instructions. In the event Marcello files a petition for certiorari, Roemer hereby adopts any such issues by reference.

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OPINIONS BELOW:

There were two opinions in the district court, *United States v. Marcello*, 508 F.Supp. 586 (E.D.La. 1981) (pre-trial motions (Appendix B) and *United States v. Marcello*, 537 F.Supp. 1364 (E.D.La. 1982) (post-trial motions) (Appendix C). The latter opinion, addressing issues raised herein, concluded with the observation that, "The legal and factual contentions asserted by the defendants for the most part raise serious and in some respects significant questions of law, policy, and priorities." *Id.* at 1386.

The opinion of the court of appeals affirming the defendant's conviction is reported as *United States v. Roemer*, 703 F.2d 805 (5th Cir. 1983) (Appendix A).[2]

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[2] The circuit court's brief affirmance, essentially deferring to the district court's opinions, abdicated the appellate court's supervisory and educational role on "serious" and "significant" issues. In so doing

JURISDICTION:

This is a criminal case. Pursuant to 28 U.S.C. §1254(1) the defendant Roemer invokes the jurisdiction of this court to review the judgment of a court of appeals in a criminal case.

The court of appeals entered its judgment affirming the defendant's conviction and sentence on April 11, 1983. A petition for rehearing en banc was timely filed on April 25, 1983, and was denied by the court on May 16, 1983. This petition for certiorari is timely filed within the 60 days afforded by Rule 20.1, Supreme Court Rules.

STATUTORY AND CONSTITUTIONAL PROVISIONS:

Mail fraud, 18 U.S.C. §1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered

(Footnote 2 continued)
the Fifth Circuit continued a lower court tradition that has seen the RICO statute stretched to applications far beyond its apparent meaning. See, Tarlow, "RICO, The New Darling of the Prosecutor's Nursery", 49 FORDHAM LAW R. 165 (1980).

by the postal service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 673; May 24, 1949, c. 139, §34, 63 Stat. 94; as amended Aug. 12, 1970, Pub. L. 91-375, §6(1) (11), 84 Stat. 778.

Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §1961, et seq.:

§1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs which is chargeable under state law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 1341 (relating to mail fraud)...(C) any act which is indictable under title 29, United States Code,...or (D) any offense involving fraud connected with a....

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of the prior act of racketeering activity.

* * *

§1962. Prohibited activities

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Louisiana public bribery, LSA-R.S. 14:118:

§118. Public bribery

Public bribery is the giving or offering to give, directly or indirectly, anything of apparent present or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:

(1) Public officer or public employee;....

* * *

The acceptance of, or the offer to accept, directly or indirectly, anything of apparent present or prospective value, under such circumstances, by any of the above named persons, shall also constitute public bribery.

Whoever commits the crime of public bribery shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

Amendment V, United States Constitution:

...nor shall any person...be deprived of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE:

Proceedings:

Roemer and his co-defendant Carlos Marcello, together with three others, were defendants in a 12 count indictment that was the product of a year long undercover sting operation in which two FBI agents posed as corrupt insurance agents eager to pay bribes in return for obtaining state insurance contracts.[3] After an 18 week jury trial, Roemer and Marcello alone were convicted of a single count charging a RICO conspiracy, 18 U.S.C. §1962(d), an agreement to operate an enterprise through a "pattern of racketeering activity", a term which requires the commission of, or agreement to commit, two criminal acts.[4] Roemer was sentenced to three years imprisonment; Marcello was sentenced to seven.

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[3] In its basic nature this operation, named Brilab, resembled the contemporaneous Abscam operation on the east coast. Abscam, however, involved matters principally of direct federal concern, the corruption of congressmen; Brilab, without some further federal connection, involved matters of only local concern, the corruption of state officials; it is the way a mailing was contrived to federalize the matter that is at the heart of this petition. Additionally, Abscam involved no actual public injury; Brilab involved actual federal corruption and distortion of a state election.

[4] Roemer and Marcello were acquitted of all substantive counts in the indictment among them mail fraud, 18 U.S.C. §1341, wire fraud, 18 U.S.C. §1343, and Travel Act, 18 U.S.C. §1952, charges and also a RICO substantive offense, 18 U.S.C. §1962(c), charging the operation of an enterprise through a pattern of racketeering activity.

Facts:

In the spring of 1979 the FBI set in motion an undercover sting operation expressly designed "to criminally involve labor officials" but ultimately involving public officials. Two FBI agents and an informant posed as employees of Fidelity Financial Consultants, a fictitious creation of the FBI, and as representatives of the Prudential Insurance Company of America, one of the largest insurance companies in the world.[5] In those roles, the agents and the informant[6] trumpeted their willingness to share enormous insurance commissions, as much as a hundred thousand dollars a month, with anyone who would help them place insurance contracts. Taking advantage of prior involvements of the informant, the agents allied themselves with the defendant Marcello.

In September 1979, through their relationship with Marcello, the agents and the informant were introduced to various public officials in Louisiana, among them the defendant Charles E. Roemer, II. Roemer was then both the Commissioner of Administration for the State of Louisiana and the campaign manager and chief fundraiser for a major candidate for governor in a hotly contested

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[5] In advertising a connection with Prudential, the government violated the terms of an agreement it had reached with that private company. *United States v. Marcello*, 537 F.Supp. at 1367, n. 3.

[6] The informant Joseph Hauser, characterized by the trial court as a "career con man", 537 F.Supp. at 1367, was paid a salary of $75,300 by the government over a 19 month period and through the government's intervention was effectively able to escape punishment on a 10 count federal indictment charging him with theft of $3.5 million. In his eagerness to serve, Hauser, whose conversations were electronically recorded, on three occasions simply manufactured conversations calculated to incriminate important individuals among them the then Attorney General of the United States, a leading candidate for governor of Louisiana and Marcello himself. 537 F.Supp. at 1371-1373.

campaign that was then in full swing.[7] Viewing the evidence in the light most favorable to the government, Roemer thereafter agreed to accept a share of future insurance commissions in return for his assistance in getting the state insurance contracts placed through the agents' fictitious agency. With this agreement, the crime of bribery in violation of state law was complete.[8] LSA-R.S. 14:118, *supra*, p. 4.

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[7] The involvement of the government and its agents in that election is notable. Ostensibly as campaign contributions, the agents and the informant gave ten thousand dollars to a gubernatorial candidate who narrowly missed the two-person run-off, ten thousand dollars to a gubernatorial candidate, who narrowly made that run-off, and twenty-five thousand dollars to the defendant. Although it is disputed whether the contribution to the defendant Roemer was spent on the campaign, there has been no suggestion that the other contributions were not so spent and neither of those candidates was prosecuted. Additionally, the informant in acting out his part falsely told candidates that other candidates had been corrupted by him. These lies, which could ruin a candidate and distort an election, as similar government lies destroyed the 1972 candidacy of Edmund Muskie, were justified by the government as being a "part of the ruse".

Without any pre-existing reason to believe that any state candidate or official was corrupt, without considering what the state bribery and election laws were, without a warrant or probable cause, and without advising anyone in the state until months after the election, the government simply decided that a state election was the appropriate occasion for it to engage in a masquerade pursuant to which it would scatter about federal money, and federal lies and misinformation, without any regard whatsoever for the potential effect on the democratic process. As such this FBI sting operation raises serious concerns about the proper relationship between the states and the federal government and the limits, due process or supervisory, that should be imposed on such operations. See, *infra*, pp. 20-22.

[8] Roemer's defense was that his agreement in this regard was not a genuine one, since he knew the contract didn't provide for commissions and that, even if it did, it wouldn't provide commissions at the level suggested by the agent. Roemer asserted that he was simply going along with the agents in order to secure a twenty-five thousand dollar campaign contribution for the campaign of which he was chairman. See, n. 7, *supra*.

The interactions concerning the insurance contract between Roemer, the agents, the informant and Marcello lasted through the balance of 1979 and involved several personal meetings and phone calls. At the beginning, the informant had suggested that he might make a "proposal" to Roemer, detailing the insurance services his agency could provide. In ensuing conversations, there were continued references to the proposal by all parties. From time to time, when pressed by the informant, the agents or Marcello as to how the deal was progressing, Roemer would inquire where the proposal was. On a single occasion, there was a discussion as to how the proposal might be delivered and Roemer suggested that he would meet the informant at the airport and pick it up personally or that the informant could leave it with Marcello and that Roemer could get it from Marcello. Neither then, nor at any other time, was there any discussion about using the mails to deliver the proposal.

In early November, 1979, for their own reasons,[9] the agents decided that it was appropriate to get some kind of proposal to Roemer and, acting on their own, they decided that the way to do it was with a letter. To that end, in their Los Angeles office, the agents typed a transmittal letter to Roemer. The letter was on the spurious letterhead of the insurance agency and was addressed to Roemer with a complete mailing address that detailed a post office box and a zip code, both essential for mail delivery and for no other purpose. The agents then brought the letter to New Orleans. When they arrived there, they enlisted the help of Marcello's secretary and directed her to retype the letter that they had already prepared because of a typographical

[9] The agents professed a concern that if they didn't appear to press Roemer on the contract, Marcello, with whom they were pursuing other matters, might become suspicious.

error and to type an enclosure to accompany that letter.[10] After they then involved the secretary in addressing the envelope, the predictable occurred. Possessed of a signed letter, complete with inside address, post office box and zip code, Marcello's secretary, as would any other, asked the informant and the agents whether they wanted her to mail it for them. To which the government informant said yes; and the government agents said yes; and indeed the government agents even suggested express mail. A letter designed by the government to be mailed was thus mailed at the direction of the government. The exact conversation was as follows.

> DECKER (Secretary): You want me to have him [Wacks, the agent] sign it?
>
> HAUSER (Informant): Let me have, let him sign it. *Address the envelope, and then...*
>
> DECKER (Secretary): And I'll...
>
> HAUSER (Informant): Then uh.
>
> DECKER (Secretary): *You want me to mail it for you?*
>
> HAUSER (Informant): *Would you mail it? I'd appreciate it very much.*
>
> WACKS (Agent): Sign it.
>
> DECKER (Secretary): Yeah.
>
> MONTEGUT (Agent): *Express mail.*
>
> HAUSER (Informant): No she's going to mail it.

[10] The agents conveniently carried blank letterhead with them for these purposes.

DECKER (Secretary): If you mail it,...I'll mail it at the post office today, it's okay.

MONTEGUT (Agent): Oh really. Okay, that's fine.

G. 109T, pp. 8-9.

It was government agents who designed and created a letter to Roemer; and it was government agents who, in response to a secretary's question, directed that the letter be placed in the United States mails. Roemer, of course, had no involvement in the actual mailing itself and had never in any way indicated any desire to receive the proposal by the mails. Marcello, likewise, had no involvement in the preparation of the letter or in the decision to mail it. After Marcello learned, however, that the agents had prepared the letter and were mailing it, he decided to call Roemer. In that telephone conversation, Marcello stated that the proposal had been prepared and then told Roemer (falsely) that it had been mailed the preceding day. To Marcello's statement Roemer responded simply, "Okay. That's good then", and the conversation ended.[11]

The decision to write a letter, the decision to put an address on the letter, the decision to include a post office box and a zip code, the decision to direct the secretary to mail the letter, were all decisions exclusively reached and implemented by the federal agents and the federal informant. By their act of will alone was a letter created and a letter mailed. That government created mailing was the critical and substantive element of the government's case

[11] Having committed himself to Roemer that the proposal was in the mail, Marcello thereafter indicated that he hoped that the letter was mailed right away; the record does not establish whether the letter was then already in the mail.

against Roemer and whether it can serve in that role is the issue presented by this petition.

ARGUMENT:

RICO is the acronym for the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, et seq., a statute directed at persons who commit a series of crimes in pursuit of some activity or "enterprise".[12] At its heart is the "pattern of racketeering activity" describing the commission of two or more specified criminal acts. 18 U.S.C. §1961(1) and (5). Among the criminal acts that may qualify as predicate crimes for the "pattern of racketeering activity" are state violations of state bribery statutes, §1961(1)(A), and federal violations of the federal mail fraud statute. §1961(1)(B). The substantive RICO offense, 18 U.S.C. §1962(c), requires proof that a defendant committed two or more criminal acts, constituting a pattern of racketeering activity; the conspiracy RICO offense, 18 U.S.C. §1962(d), requires proof that a defendant agreed to commit two or more criminal acts, constituting a pattern of racketeering activity. *United States v. Martino*, 648 F.2d 367, 383, 396 (5th Cir. 1981). Roemer was convicted of the conspiracy offense.

It is conceded that the evidence established that Roemer, by his agreement to divide commissions, agreed to commit one criminal act, bribery in violation of state law. The issue in this case concerns the existence of an agreement to commit a second criminal act: specifically, whether the government's own orchestrated mailing can legally and constitutionally serve as the basis for finding an agreement to commit a second criminal act, mail fraud. Under the

[12] The enterprise aspect has been addressed by the Court in *United States v. Turkette*, 101 S.Ct. 2524 (1981).

indictment that mailing was charged as mail fraud, the bribery scheme being the fraud and the mailing being in furtherance; and the allegation that Roemer had agreed to commit such mail fraud was charged as the second criminal act essential to the RICO conspiracy count on which Roemer was convicted.[13] The government's accusation that Roemer is chargeable under the mail fraud and RICO statutes with agreeing to commit a mailing evidenced solely by a letter that was conceived, chosen and executed by government agents, acting independently of Roemer, is the linchpin of the government's case. It is the key element that at the same time both federalizes the underlying state offense and gives birth to the second offense necessary for a RICO prosecution. As a matter of law and policy, that linchpin must be recognized as an artificial and insufficient contrivance.

Statutory:

As a matter of statutory interpretation and suffici-

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[13] As drawn, the indictment originally recited seven possible predicate acts for the substantive and conspiracy RICO charges. Three of those acts were charges of state bribery which the district judge found to constitute the single offense of state bribery conceded above. 537 F.Supp. at 1381-1382. Two acts were separate substantive counts of wire fraud on which the district judge granted judgments of acquittal. Only three acts, therefore, went to the jury, one was the state bribery; one was the mail fraud discussed at length here; and one was a count of wire fraud. Although the wire fraud charge can also be attacked on the grounds of manufactured and artificial jurisdiction raised here (the use of interstate wires arose solely because at the time of a phone call by Marcello, the informant was out of state), the focus in this petition is on the mail fraud charge because, under established principles of conspiracy law, if an indictment charges multiple objects of a conspiracy, and if the law cannot allow conviction under one of those objects, then the conspiracy conviction cannot stand absent some proof that the jury did not rely on the legally invalid object. *Van Liew v. United States*, 321 F.2d 664, 672 (5th Cir. 1963); *United States v. Dansker*, 537 F.2d 40 (3rd Cir. 1976); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981). See, 537 F.Supp. at 1382, n. 48.

ency of evidence, the mailing at issue here cannot be permitted to form the basis of a prosecution either for mail fraud, or derivatively for RICO, for to do so allows the government indiscriminately to furnish the substantive element of a criminal offense and to multiply those offenses. Under *Pereira v. United States*, 347 U.S. 1 (1954), a person is guilty of mail fraud only when he acts "with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen" and is guilty of conspiracy only when there "is an agreement to use the mails to defraud".[14]

The government has sought to justify its reliance on the mailing in two ways. First, the government has argued that some sort of mailing was in any event generally forseeable given the fact that the entire scheme involved insurance contracts placed with large interstate businesses. Second, the government has argued that Roemer's assent to Marcello's announcement that the proposal was in the mail constituted Roemer's own agreement to the crime.

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[14] In discussing the propriety of relying on the government supplied mailing, either in statutory terms as here or in jurisdictional and due process terms, *infra*, pp. 17-22, it is important to distinguish the mailing element of the mail fraud statute from the federal element of most federal statutes. In *United States v. Feola*, 420 U.S. 671 (1975), the Court held that where a defendant's knowledge of the federal element (there the fact that a person assaulted was a federal officer) need not be shown to establish the substantive offense, it likewise need not be shown to establish the conspiracy offense. As *Pereira* shows, however, mail fraud does not fall into that category; knowledge, or the imputed knowledge that comes from forseeability, is an essential element. The mailing in mail fraud, unlike identity in *Feola* and interstate transportation in other crimes, is thus not a "merely jurisdictional" fact whose only "consequence is the choice of judicial forum", *Feola* at 685; the mailing is the crime itself, and an element which in some cases alone renders a scheme criminal. The issue raised here involves much more than a government charade in which a "merely jurisdictional" federal element is supplied; it involves a government charade in which a substantive element, albeit jurisdictional as well, is furnished.

Both arguments fail.

As to the first, Roemer was not charged with some generalized agreement to commit a fraud in which some mailing at some time might foreseeably occur;[15] he was charged with an agreement to commit mail fraud with reference to the specific mailing that occurred only because government agents willed it to occur. The actual mailing was the key to the allegation of foreseeability. As to the second argument, Roemer's acknowledging response to Marcello's announcement that the proposal was in the mail is utterly neutral and unremarkable; any citizen is going to react in precisely the same way to the announcement that something has been mailed to him.[16] Indeed, the only person who would object to a mailing would be a criminal so sophisticated that he knew he should stay away from mailboxes altogether.[17]

Basically, the government's argument is that so long as the use of the mails is in some general sense foreseeable in whatever undercover operation it confects or so long as a defendant does not object to the use of the mails, then government agents are free on their own to initiate mailings. These circumstances or conditions, however, define

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[15] Defendant knows of no case in which a conspiracy to commit mail fraud was charged when there was not in fact a mailing, although theoretically such a charge might be brought at least if the agreement specifically contemplated the mails. Compare *Feola*, *supra*, at 695-696.

[16] In any event there is no legal or rational support for the idea that a citizen's after the fact acquiescence in an act constitutes a before the fact agreement to commit it.

[17] In this regard it should be noted that the predisposition aspect of the traditional entrapment defense provides no protection to the citizen; virtually everyone is predisposed to using the mails and so under entrapment analysis there is no way a citizen can complain that he was lured into using the mails.

no limits. What undercover sting operation within the general parameters of "white collar" crimes, indeed what operation of any complexity, does not sooner or later involve the possibility of using the mails, if only as here for a communication between "co-conspirators"? What citizen, criminal or otherwise, objects to the receipt of something in the mail?

There are no limits under the government's argument. Agents are free to initiate mailings and when they do so those defendants with whom they are involved may be charged on the basis of each and every such mailing with as many mail fraud offenses as there are government mailings and even with RICO offenses. To premise mail fraud prosecutions on mailings such as that here eliminates the mailing element of the crime. Foreseeability ceases to be an element determined by the acts and plans of the wrongdoers; it becomes what it is not supposed to be, see, *supra*, p. 14, n. 14, a "merely jurisdictional" element satisfied by the unilateral act of a federal agent who may simply hasten to the mailbox and base foreseeability on his own choice to mail a letter.

To premise RICO prosecutions on such mailings is even more pernicious for it allows the enhanced penalties of that statute to be triggered by a government agent's choice to multiply crimes by mailing letters rather than by a defendant's personal commission or agreement to commit additional crimes. The very premise of RICO is that it should only reach those persons who have the double mental element associated with the commission of two crimes, persons who distinguish themselves by their willingness to commit a "pattern" of crimes, persons who are twice guilty. If the government's own letter in circumstances like these can supply that second crime, then the statutory

requirements of RICO become meaningless.

Jurisdictional:

There are limits to the power of government agents to contrive and manufacture the substantive elements of crimes that alone make those crimes subject to federal prosecution. Those limits were recognized in the seminal opinion of Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2nd Cir. 1973). Those limits were exceeded in that case and they have been exceeded here.

In *Archer*, FBI agents staged a state arrest and then paid bribes to state officials to secure dismissal of the resulting state indictment; as a consequence, an assistant district attorney was charged in federal court with bribery under the Travel Act, 18 U.S.C. §1952. The jurisdictional predicate to the charge was the fact that the defendant had made one or more interstate or foreign telephone calls. Rejecting one phone call because it had been contrived for jurisdictional purposes and one because it was purposeless, the *Archer* court found the remaining call from the undercover agent to the defendant "insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States". 486 F.2d at 683. Without resolving that ultimate question, the court held that,

> [W]hen the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves;...

Id. at 685-686.

and found that the single phone call which it characterized as "a casual and incidental occurrence" and "a matter of happenstance" to be an insufficient action to meet that standard.

The defendant has canvassed all the RICO cases and all the cases raising *Archer* issues.[18] There is simply no case in which the exercise of federal jurisdiction and the application of federal substantive law is so totally dependent upon elements furnished through government agents acting on their own initiative and at their own direction. Like *Archer*, the jurisdictional and substantive reed upon which this case perches is simply too slender, too insubstantial and too much the product of the government's own contrivances rather than the defendant's own acts.

In recent years there has been well-reasoned criticism of the government's increased assertion of jurisdiction over local matters purely premised on mailings, wire communications and travel of only incidental significance.[19] In *United States v. Craig*, 573 F.2d 455

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[18] *Archer* has received widespread acceptance, although no other court has yet reversed a conviction on its basis. *United States v. Perrin*, 580 F.2d 730 (5th Cir. 1978); *United States v. Pecora*, 693 F.2d 421 (5th Cir. 1982); *United States v. Gambino*, 566 F.2d 414 (2nd Cir. 1977); *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978); *United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1982); *United States v. Tucker*, 481 F.Supp. 182 (E.D.N.Y. 1979); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975); *United States v. O'Connor*, 635 F.2d 814 (10th Cir. 1980); *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976). Each of these cases involved existing criminal activity that either directly implicated federal concerns or invited federal participation. In none, with the possible exception of *Jannotti*, was there an entirely FBI confected scheme to create a federal crime out of local behavior. Even in *Jannotti* the FBI did no more than supply the "merely jurisdictional" interstate commerce element of a crime, compare *Feola*, *supra*, not as here the substantive mailing itself.

[19] See, e.g., *United States v. Williams*, 621 F.2d 123, 126 (5th

(7th Cir. 1977) (dissenting opinion), Judge Swygert described the conceptual contortions undergone by federal prosecutors as they sift through files, documents, letters and phone calls searching for some small peg on which to hang their big case. There can be little doubt that the government here went through the same process.[20] But the situation here has gone one step further still. When the

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(Footnote 19 continued)
Cir. 1980) (Tate, J., concurring); *United States v. Curry*, 681 F.2d 406, 425 (5th Cir. 1982) (Garwood, J., concurring); *United States v. Pecora*, *supra* (Brown J., concurring and dissenting); *United States v. Craig*, 573 F.2d 455 (7th Cir. 1977) (Swygert, J., dissenting); *United States v. Wander*, 601 F.2d 1251 (3rd Cir. 1979) (Aldisert, J., dissenting).

[20] Wrote Judge Swygert:

> Once the investigation is completed, consideration is then given to what federal offense, if any, has been committed. The mail fraud statute? The federal travel act? The investigation files are searched to find some mailings or evidence of interstate travel. The United States Attorney's office sifts through the mailings in the file and then constructs a legal theory in order that they may be used to form the basis for a charge of mail fraud. One fortuitous trip, totally incidental and unforseen, by an unindicted coschemer forms the basis of the two travel act counts. A conspiracy count is, of course, added. In this fashion, the mail fraud statute and the travel act are subverted to purposes for which they were never intended. No longer are the mailings and travel considered essential or an integral part of the scheme; they are seen and used as mere technicalities which are necessary to obtain federal jurisdiction. Naturally, the public is pleased, and rightfully so, that corrupt public officials have been brought to book. But what of the prosecutor's responsibility to use the federal criminal laws only in a manner in which they were intended? Once the prosecutor determines that federal jurisdiction is lacking, his responsibility lies in cooperating with the state law enforcement officials and aiding the state in prosecuting the guilty. When he seeks convictions for crimes that are not within the federal jurisdiction, he acts irresponsibly and not in keeping with his high office. The court should not condone.
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> 573 F.2d at 505.

hundreds of hours of tapes and conversations were analyzed, viewed, reviewed and reviewed again, the mailing that the prosecution finally found was there only because the government created it. This case has stretched federal jurisdiction the last step. The government need no longer search for a federal connection; it may now simply create that connection itself by using the mails.

Congressional and constitutional policies counsel against judicial and executive measures that "transform relatively minor state offenses into federal felonies", and "alter sensitive federal-state relations". *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Bass*, 404 U.S. 336, 349 (1971).[21] Those policies are merely empty slogans if crimes can be denominated federal not because of acts committed by defendants and not because of definitions of those crimes, but because federal undercover agents are free to create and furnish federal elements whenever and wherever they please. In the present case the federal agents and the prosecution went too far when, acting alone, they supplied the mailing upon which the government relied not merely to transform a state offense into a federal offense but to transform it into the two-crime "pattern of racketeering activity" punishable under RICO by 20 years imprisonment.

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[21] In *Williams*, *supra*, Judge Tate recognized that while bribery of a state official was conduct roundly to be condemned, absent required interstate elements it should be subject to prosecution only under state law.

> Much as we may deplore such conduct and wish for its extirpation and punishment, respect for our federal system demands that, in the absence of congressional intent validly exercised, local criminal conduct be punishable through prosecution by the state rather than by the central government.
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> 621 F.2d at 126.

Due Process; Supervisory Power:

For there to be mail fraud, there must be a use of the mails; the use of the mails is the essential element that makes fraudulent conduct a crime punishable under 18 U.S.C. §1341. While it is not necessary, of course, that a defendant himself use the mails, it is necessary that a defendant "cause" the use of the mails, a standard he is held to have met when a "foreseeable" mailing actually occurs. *Pereira, supra.* Every such mailing is an independent offense; but until there is a mailing, the crime has not occurred. Here, government agents, by their own choice so to manipulate their charade and without any direction from a defendant, chose to employ the mails and thus to create the use of the mails without which there would have been no federal crime and no RICO crime.[22] Reliance on such government manipulated mailings to create crimes with which to charge citizens and to multiply crimes so as to employ statutes like RICO goes too far and should be proscribed either under due process principles or under the Court's supervisory power.

In *Hampton v. United States*, 425 U.S. 484 (1976), although a plurality of the Court held that government over-involvement could be challenged only through the traditional entrapment defense focused on predisposition, a majority of the Court recognized that in appropriate cases government over-involvement requires scrutiny under the due process clause or under the Court's supervisory power.[23] Such scrutiny is appropriate here.

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[22] Presumably had the underlying state bribery been a misdemeanor and thus not qualify as a predicate crime under 18 U.S.C. §1961(1), the government agents could have mailed two letters to satisfy the "pattern" requirement of RICO.

[23] Opinion of Powell, J., joined by Blackmun, J., concurring in

In concurring in *Hampton*, Justice Powell observed that the Court had not yet had occasion "to confront Government over-involvement in areas outside the realm of contraband offenses". 425 U.S. at 493. Justice Powell, acknowledging Judge Friendly's opinion in *Archer*, recognized that different considerations might be involved.

> Judge Friendly recently expressed the view: "[T]here is certainly a [constitutional] limit to allowing government involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of citizens is a course that courts should be extremely reluctant to sanction." *United States v. Archer*, 486 F.2d at 676-677.
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> 425 U.S. at 493, n. 4.

The government masquerade in the instant case did precisely such injury to the rights of the citizenry. In this respect the case is different from the private charades of the Abscam cases. Here the free election for a state's highest office was irreparably distorted by federal agents who distributed tens of thousands of dollars to state candidates for governor and who disseminated scandalous lies and misinformation about these candidates. See n. 7, p. 7, *supra*. All of this was done to prove that it could be done, not because of some specific complaint about possible wrongdoing and not on the basis of any evidence that some

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(Footnote 23 continued)
the judgment, 425 U.S. at 491; opinion of Brennan, J., joined by Stewart, J. and Marshall, J., dissenting, 425 U.S. at 495.

actual criminal conduct was taking place.[24] It is difficult to conceive of a federally directed ruse more injurious to the rights of citizens in a democratic society, or more insensitive to the nature of federal and state relations.

The government's involvement, in the crime itself, goes even further than it did in *Hampton*. Here, the government has arrogated to itself the power not simply to create the opportunity and to furnish the implements for a crime but to create the crime itself, and as many counts thereof as it wishes, simply by choosing to mail letters. The crime itself has ceased to be the individual's act; it has become the government's invention.[25]

CONCLUSION

The RICO conspiracy conviction of the defendant Roemer has undeniably involved an extreme example of federal "investigative" activity, one that raises serious policy questions about the existence of limits upon the power of federal agents to manipulate and create federal crimes. These issues are potentially at the heart of each and every "white collar" undercover sting operation that the federal government chooses to produce and direct. The mailing on which the government contrived to base a RICO prosecution in this case can find its way into any scheme the government chooses. As this case evidences, those schemes are becoming increasingly grand and sophisticated. There must surely be limits to the government's

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[24] There is thus not the same justification for extreme law enforcement measures as is the case in narcotics trafficking. Compare 425 U.S. at 495, n. 7 (Powell, J., concurring).

[25] "*It was with the purpose* of protecting the public against [frauds] and to *prevent the post office from being used to carry them into effect, that this statute was passed.*" *Durland v. United States*, 161 U.S. 306, 315 (1896).

ability to confect a "white collar scam" and then to run to the mailbox and indict for mail fraud, or to make that run twice and indict under RICO.

The case presents the question of those limits, a question that given the increased number of these kind of government masquerades and the progressively expanding view of the RICO net is worthy of this Court's full consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Martzell, a member of the bar of this Court, hereby certify that copies of this petition for certiorari have been served on the respondent United States of America by mailing three copies thereof, postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, and three copies to John Volz, Esq., U.S. Attorney, 500 Camp Street, New Orleans, LA 70130, and on the co-defendant Carlos Marcello by mailing three copies thereof, postage prepaid, to Arthur A. Lemann, III, 400 Lafayette Street, New Orleans, LA 70130, this_____day of June, 1983.

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JOHN R. MARTZELL